ADVANCED DUI SEMINAR

December 12, 2016 Phoenix, Arizona



DUI HOT TOPICS

Presented by:

BETH BARNES

GOHS TSRP, Assistant Phoenix City Prosecutor Phoenix, Arizona

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL 1951 West Camelback Road, Suite 202 Phoenix, Arizona 85015

ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

DUI Hot Topics

APAAC Advanced DUI Seminar December 12, 2016





Ignition Interlock DUI Drugs

SB 1228

- Ignition interlock order will be discretionary for persons convicted of DUIs not involving alcohol.
- Violations of 28-1381(A)(3) will no longer result in a mandatory one year drivers license revocation.

**Effective date 1/1/2017 Amends A.R.S. § § 28-1381(A)(1) and (A)(3)

SB112 is DOV Specific

- ARS § 1-244: "No statute is retroactive unless expressly declared therein."
- ARS § 1-246: when penalty for an offense is changed by statute, "the offender shall be punished under the law in force when the offense was committed."
- State v. Harris (Maxwell, RPI) 232 Ariz, 34 (App. 2013).



Affirmative Defense DUI Drugs

SB 1295

Expands the DUI/OUI affirmative prescription drug defense to include prescription drugs prescribed by <u>any</u> licensed medical practitioner who is authorized to prescribe the drug.

**Effective date 8/6/2017 Amends A.R.S. § § 28-1381(D); 5-395(C)

Affirmative Defense Changes Are DOV Specific

- ARS § 1-244: "No statute is retroactive unless expressly declared therein."
- ARS § 1-244 applies to affirmative defenses. Garcia v. Browning, 214 Ariz. 250, 151 P.3d 533 (2007) (superseded by statute).

Implied Consent/Admonitions

28-1321 (C) State v. Havatone, 1 CA-CR 14-0223



Admonitions

Breath Test Cases

- Admonitions provide no basis for suppression of breath test results under 4th Amendment.
- Warrantless breath tests may be administered as search incident to arrest under 4th Amendment. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).
 - Even if obtained through coercive admonitions (AZ constitution also). State v. Navarro, 2 CA-CR 2016-0020.

What About Navarro Fn 3?

• "Although our implied consent statute, A.R.S. § 28-1321(B), (D), normally prohibits law enforcement officers from collecting samples for chemical testing in the absence of either actual consent or a search warrant, Navarro has not developed any argument that a violation of this statute requires the suppression of evidence in a criminal trial...."

Does 28-1321 (B),(D) Mandate Suppression?

- Careful conceding the statute can require suppression
- Navarro Fn 3 is just a comment
- If you have consent to the test argue it

Does 28-1321 Mandate Suppression?

- If there is no constitutional basis for suppression – it must come from the statute
- While the language used when invoking the implied consent statute may render a test involuntary (Valenzuela), the statute itself does not mandate/suggest suppression.
- Exclusionary Rule?

Does 28-1321 Mandate Suppression?

- 28-1321 addresses <u>civil</u> administrative license suspensions
 - > The prior version of the implied consent statue [28-691(B) "only addresses the civil suspension penalty for refusing to take the test." *State v. Vannoy*, 177 Ariz. 206, 210 (App. 1993).

Does 28-1321 Mandate Suppression?

- What is Defendant's legal authority just saying I get suppression is not enough
- Valenzuela, addressed coercion/voluntary consent and imposed suppression for a Fourth Amendment violation - not the statute.

Does 28-1321 Mandate Suppression?

- Carrillo v. Houser, 224 Ariz. 463 (2010), merely held statute does not authorize police to administer tests without a warrant unless the arrestee expressly agrees to the test.
- It did not hold that the statute does or can provide for suppression
- What does it say about A.R.S. § 28-1321(B) & (D)
 - > (B) "allows arrestees to refuse consent with the consequence of a license suspension"
 - > (D) "makes clear that the statue does not itself authorize warrantless testing upon an arrestee's refusal"

_			
_			
_	 	 	
_			

Point Out the Purpose of the Implied Consent Law

To remove impaired drivers from the highways.

Campbell v. Superior Court, 106 Ariz. 542 (1971); State v. Brito, 183 Ariz. 535 (App. 1995); Traylor v. Thorneycroft, 134 Ariz. 482 (App. 1982); Shade v. DOT, 175 Ariz. 460 (App. 1993); Sherrill v. Dep't of Trans., 165 Ariz. 495 (1990); Carrillo v. Houser, 224 Ariz. 463 (2010).

Look for Support from Other Jurisdictions

- State v. Gunn, 408 So.2d 647 (Fla. App. 1981).
- Landgraff v. State, 740 S.W.2d 577 (Tex. App. 1987).
- State v. Trenary, 850 P.2d 356 (1993).

Admonitions

- The above arguments should assist if the officer chose not to read the admonitions
- Include a Good Faith Argument in Breath and Blood Cases

Admonitions Defense Claim If the officer read a prior version of the Admonitions, the breath/blood test should be suppressed **OLD Admonitions Cases** • If Breath Argue Birchfield & Navarro Verify Which Version Was Used > "Required" language removed 1/1/2016. • These versions are <u>not coercive</u> Valenzuela does not say we must use certain Look at How the Officer Advised Suspect > See, Valenzuela **OLD Admonitions Cases** Ague Good Faith > Valenzuela ¶¶ 31 – 35 indicates officers could rely on old law/admonitions in good faith.

General Opinions for Good Faith
 Utah v. Strieff, 136 S.Ct. 2056, 2063 (2016).
 Herring v. United States, 555 U.S. 135 (2009).

Prescription Drug DUIs	
Marijuana DUIs	
Actual Physical Control Stationary Shelter and Tarr	

State v. Tarr, 235 Ariz. 288 (App. 2014).

- **HOLDING:** Defendant <u>was not</u> entitled to requested stationary shelter instruction
- Zaragoza instruction adequately instructs the jury on APC
- ▶ Dicta: Defense stationary shelter jury instruction was a correct statement of law
- Defense will argue opinion says I get a stationary shelter instruction

Zaragoza APC Instruction

In determining whether the defendant was in actual physical control of

This list is not meant to be allinclusive. It is up to you to examine all
the available evidence and weigh its
credibility in determining whether the
defendant actually posed a threat to
the public by the exercise of present or
imminent control of the vehicle while
impaired.

available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of presen or imminent control of the vehicle while impaired.

Compare Love

This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant was simply using the vehicle as a stationary shelter or actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired

Love, at 326.

 Zaragoza specifically took "stationary shelter" language out 	
• Zaragoza = Supreme Ct.	
 Zaragoza says: "we believe that the following modified form of the RAJI should be used in future actual physical control prosecutions." 	
• Tarr = Ct. of Appeals	
 Supreme Ct. obviously considered issue & removed stationary shelter language 	
Take copies of both opinions to court	
]
Prepare & Propose APC Instructions	
 APC does not require proof the person intended to drive 	
 Jury is not to determine the defendant's purpose 	
NOT "stationary shelter" if danger exists	
(be sure to argue) Circumstantial evidence of driving	
APC/DUI can occur on private property	
Definition of Drive [ARS 28-101(17)]	
]
Use Favorable Portions of Tarr	
 "Imminent control" language in APC instruction was proper 	
 Reiterated suspect's purpose (whether to place vehicle in motion) is not relevant to APC/DUI 	

Use Favorable portions of *Tarr* Acknowledged State does not have to elect charges Circumstantial evidence of driving **Recent APC Decision** • State v. Saucedo, No. 1 CA-CR 15-0383; 2016 WL 1104876 (App. 2016). Memorandum – see Rule 111(c), Rules Supreme Ct. Sufficiency of the evidence, circumstantial driving, etc. Blasts From The Past

Can't Refer to the DRE as "Expert" [Or the FSTs as Tests, etc.]	
Qualify Your Officer	
Spend some time on training & experience	
	1
Can't Refer to the DRE as "Expert"	
State v. Campoy (Cordova, RPI), 214 Ariz. 132 (App. 2007), reversed for precluding the words "sobriety," "test," "field sobriety test," "impairment," "pass," "fail," and "marginal" from officer's FST testimony.	
 Ct. noted these words are pervasive throughout published opinions & are proper words for describing FSTs. 	